

#2017-97

EDWARD A. BERKOVICH

REC'D SEP 20 2017

September 19, 2017

Nova Dubovik
Executive Secretary
State Records Committee
346 S. Rio Grande St.
Salt Lake City, Utah 84101-1106
ndubovik@utah.gov

**RE: Appeal of Attorney General's Office ("AGO") classification in
GRAMA Request #17-178**

Dear Ms. Dubovik:

I hereby appeal the referenced classification to the State Records Committee ("SRC").
(The decision is attached in Appendix A).

The record I request: The memo Utah Prosecution Council ("UPC") Director Bob Church ("Church") "sent to everyone detailing the history between Ed [Berkovich] and Marilyn Jaspersen." (description of the memo is in the minutes of the October 21, 2015 meeting attached in Appendix B). That memo, which is a government record, was sent prior to a public meeting of the UPC held on October 21, 2015.

The record classification I am challenging: UPC/AGO classified the memo as protected under Utah Code § 63G-2-305(17), which protects attorney-client privileged communications, and Utah Code § 63G-2-305(18), which protects attorney work product.

The legal basis of my appeal to SRC:

The memo is not protected under the attorney-client privilege.

The applicable law is:

The attorney-client privilege protects information given by a client to an attorney that is "necessary to obtain informed legal advice – which might not have been made absent the privilege." In addition, the communication must be confidential.

Utah R. Evid. 504 ("A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services...."). ... [T]o rely on the attorney-client privilege, a party must establish: (1) an attorney-client relationship, (2) the transfer of confidential information, and (3) the purpose of the transfer was to obtain legal advice.

Southern Utah Wilderness Alliance ("SUWA"), v. Automated Geographic Reference Center, 2000 UT 88, ¶ 33 (internal citations omitted).

These three factors are cumulative, that is, all three factors need to be established to validly claim a record falls under the attorney-client privilege.

None of the three factors have been established.

First, there is not and was not an attorney-client relationship between UPC Church and the UPC. Church is not UPC's client, nor is he UPC's attorney. Thus, since the first of the three required cumulative factors is not established, the attorney-client privilege does not apply.

Second, UPC/AGO waived any claim that the memo contains/transferred confidential information, because the memo was used in a public meeting, which was illegally held, under the Open and Public Meetings Act. UPC meets the definition of a public body under Utah's Open and Public Meetings Act. UPC held a meeting on October 21, 2015. That meeting has been claimed to be partially an open meeting or "General Session," and that meeting has been claimed to be partially a closed meeting or "Executive Session." There was no public notice for the meeting. See Utah Code § 52-4-202(1)(a). There was no public agenda for the meeting made available to the public. See Utah Code § 52-4-202(1)(b). The necessary conditions to disregard the 24-hour public notice requirement were not met. See Utah Code § 52-4-202(5). "Final action" was taken in the open portion of the meeting on a topic for which there was no public agenda or public notice. See Utah Code § 52-4-201(6)(c). There is no stated basis in the minutes to support the motion to go into closed session. All they say is "Bob [Church] asks for a motion to go into Executive Session," and a motion and vote followed. The requisite "sole purpose" sworn statement exempting a public body from the requirement to audio record a closed meeting was neither prepared nor signed, as required by Utah Code § 52-4-206(6).

For these reasons, the meeting was closed unlawfully, under Utah's Open and Public Meetings Act. Thus, it remained an open meeting, albeit unlawfully held.

Since "the memo [Mr. Church] sent to everyone detailing the history between Ed [Berkovich] and Marilyn Jaspersen" was likely discussed, referred to, possibly re-distributed, or read on tablets or similar devices, in an open meeting, any conceivable

claim of confidentiality is waived. Thus, since the second of the three required cumulative factors is not established, the attorney-client privilege does not apply.

Third, the purpose of the transfer of information was not to obtain legal advice. In his memo, Mr. Church was not seeking legal advice. The express purpose of "the memo" was to "detail[] the history between" two people. Thus, since the third of the three required cumulative factors is not established, the attorney-client privilege does not apply.

The memo is not attorney work product.

The attorney "work-product doctrine can be divided into two sections. ... [F]irst, work prepared in anticipation of litigation by an attorney...." *SUWA*, *id.* at ¶ 24. "[S]econd, "core" or "opinion" work product that encompasses the mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation...." *Id.*

First, the memo was not prepared in anticipation of litigation. A document may "properly [be] characterized as prepared in anticipation of litigation" only if it "would not have been generated but for the pendency or imminence of litigation." *Id.* at ¶ 25 (internal quotation marks omitted). GRAMA suggests "an even higher standard," that only a document "prepared solely for litigation use" can be properly characterized as prepared in anticipation of litigation. *Id.* (internal quotation marks omitted).

The purpose of the October 21, 2015 meeting was "to determine the continued employment status" of a person - me - who was then currently employed by UPC/ AGO. (Appendix B) There was no pending litigation, and there was no imminent litigation, since a decision to retain me or terminate me had not even been made yet. The word "imminent" means "about to happen." UPC/AGO had not even decided about my employment status yet, so there could be no imminent litigation. Thus, neither the "but for" test above, nor the "sole use" test are met.

Second, the memo was not work product. "[S]ection 63G-2-305(17)...protect[s] records disclosing an attorney's work product, including the mental impressions or legal theories of an attorney or other representative of a governmental entity concerning litigation." *Id.* at ¶ 28 (internal quotation marks omitted). "For the work product doctrine to apply, the asserting party must show that the documents or materials were prepared in anticipation of litigation[,] *id.* at ¶ 29, which means UPC/ AGO must "demonstrate the document[] [was] created to assist in pending or imminent litigation." *Id.* at ¶ 29, citing *Askew v. Hardman*, 884 P.2d 1258, 1261 (Utah Ct. App. 1994), *rev'd on other grounds*, 918 P.2d 469 (Utah 1996).

Again, there was no pending litigation, and there was no imminent litigation, since a decision to retain me or terminate me had not even been made yet. Thus, neither the "but for" test above, nor the "sole use" test above are met.

Since "opinion work product is typically evident on its face[.]...an *in camera* submission of [the disputed] materials" to SRC for its review and determination is appropriate. *Cf., SUWA*, 2008 UT 88, ¶ 29.

Finally, as discussed above, UPC/AGO waived any work product protections, because the memo was used in a public meeting, albeit illegally held, under the Open and Public Meetings Act.

Weighing of interests. Utah Code § 63G-2-403(11)(b), SRC may weigh the interests of the parties favoring access or restriction of access. Even if SRC determines the memo is a privileged attorney-client communication, or work product, any interests favoring restriction have expired, since I signed a release upon separating from UPC/AGO.

Specific relief sought: An order reclassifying the memo as public, or, in the alternative, an order for UPC/AGO to provide it to me, since I am the subject of the record.

I waive service my regular U. S. mail and I am happy to receive correspondence only by email at:

Submitted this September 19, 2017.

/s/ Edward A. Berkovich
Edward A. Berkovich